No. 78-201

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN B. GREENHOLTZ, CHAIRMAN OF THE NEBRASKA BOARD OF PAROLE, ET AL., PETITIONERS

v.

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the procedural protections of the Due Process Clause apply to Nebraska's parole release proceedings.

2. Whether, if the Due Process Clause applies to parole release proceedings, the safeguards prescribed

by the court of appeals are required by the Constitution.

INTEREST OF THE UNITED STATES

This case involves the question whether and to what extent proceedings to determine whether a prisoner should be released on parole implicate the Due Process Clause. This Court's decision necessarily will affect the constitutional rules governing the operation of the federal parole system.

1. The United States maintains an extensive parole system. In fiscal year 1976, the most recent year for which figures are available, the United States Parole Commission made 10,228 final parole decisions concerning adult prisoners, granting parole in 4,429, or approximately 43 percent, of the cases. United States Board of Parole, *1973-1976 Annual Report* 22.

Under the provisions of the Parole Commission and Reorganization Act, 18 U.S.C. 4201-4218, and of the Commission's regulations (28 C.F.R. Part 2, 42 Fed. Reg. 39808), each prisoner is afforded numerous opportunities to participate in the process for deciding whether he should be released on parole. The Commission provides application forms to each eligible prisoner. The Commission holds an initial hearing and it attempts to set a presumptive release date or an effective parole date;[1] it gives the prisoner written

[1] The Commission usually sets a presumptive release date when the sentence is seven years or less. Because the Commission does not set a release date more than four years from the date of the hearing, it often does not set a presumptive release date when the sentences exceeds seven years. In those cases the Commission postpones parole consideration for four years and schedules another hearing.

notice of the time and place of the hearing; it gives the prisoner reasonable access to documents in his file; the prisoner is entitled to be represented at the hearing by a person of his choice. The prisoner or his representative may make a statement at the conclusion of the interview and provide information for the Commission's consideration.

The initial parole hearing is conducted by a panel of two examiners designated by the Commission. The panel informs the prisoner of its recommendation and, if it recommends the denial of parole, of its reasons. The initial decision is made by a regional Commissioner on the panel's recommendation.

The Commission has published a full explanation of the factors it considers in acting on applications for parole. These factors include the facts relating to his offense, his prior criminal record, his personal and social history and institutional experience, and his release plans. Objective guidelines indicate the customary range of time to be served before release for various combinations of these factors. If parole is denied, the prisoner is furnished with a "guideline evaluation statement," which sets forth the factors on which the Commission relied and shows the Commission's evaluation of those factors in the prisoner's case. The Commission may elect to parole a prisoner either before or after the time provided by the guidelines, and when it does so it provides an additional statement of reasons.

The prisoner may appeal an adverse initial decision to the regional Commissioner.[2] The appeal usually is handled on the record of the initial hearing, but attorneys, relatives and other interested parties may appear in the discretion of the Commissioner. The regional Commissioner's decision can be appealed to the National Appeals Board, whose decision is final.

2. Unless the Court should hold that the Due Process Clause not only applies to parole release decisions but also requires more elaborate procedures than those the court of appeals held to be "due," the Commission's procedures are unlikely to be directly affected by the outcome of this case. For the reasons that we discuss below, we believe that the procedural protections of the Due Process Clause apply to parole release proceedings only if the parole statute creates an entitlement to release from confinement absent specific findings of the inmate's unsuitability for release. In our view, the Nebraska statute at issue here creates such an entitlement, whereas the federal counterpart does not. Accordingly, the interest of the United States is to defend the prerogative of Congress to continue the present discretionary system of parole and to experiment with new procedures for parole determinations.

The Parole Commission and Reorganization Act illustrates the continuing process of experimentation, a process that is, in our view, vital to improvement of parole procedures. Many of the reforms embodied

[2] This amounts to asking the Commissioner to reconsider his prior decision.

in the Act were developed after a three-year study conducted by the National Council on Crime and Delinquency and an analysis of the results of a pilot project begun in October 1972 in one of the Commission's regions, then were applied nationwide through regulations, and, when demonstrated by further evaluation to be valuable to the parole process, were adopted by Congress. See generally S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. (1976).

The reforms include a system of periodic review hearings, the use of specific guidelines to help acnieve consistent treatment of similar cases, and a detailed enumeration of the information to be considered in parole release decisions. In addition, the Commission recently has instituted a practice of attempting to set, early during a prisoner's sentence, a presumptive release date; the Commission is seeking to reduce the uncertainty that prisoners experience while waiting to know how long they must remain in prison (see 28 C.F.R. 2.12, 42 Fed. Reg. 39811). If this Court should hold that the Due Process Clause applies to parole release determinations whether or not the parole statute creates a clear entitlement to parole absent specified findings of unsuitability, future experimentation and alteration of the parole process could be inhibited.

Moreover, in addition to parole, many types of decisions affecting prisoners, such as those concerning eligibility for work-release programs and furloughs, involve opportunities for prisoners to acquire some "conditional liberty" at the discretion of penal auth-

orities. Similarly, many decisions that do not involve a temporary release from incarceration may nevertheless involve greater liberty within the institution—decisions relating to security classifications and work assignments are but two of many examples. The Court's resolution of the question presented here could have significant implications for the institutional handling of such decisions.[3]

STATEMENT

1. Nebraska inmates are eligible for release on parole on completion of their minimum sentences,

[3] A federal prisoner may apply for a discretionary short-term release on furlough. One court of appeals has held that there is no need for prison officials to provide hearings concerning such applications (*Smith* v. *Saxbe*, 562 F.2d 729, 734-735 (D.C. Cir. 1977)), but the Second Circuit has held that furloughs are like parole and may not be denied without hearings (*Zurak* v. *Regan*, 550 F.2d 87, cert. denied, 433 U.S. 914 (1977)). See also *Durso* v. *Rowe*, 579 F.2d 1365 (7th Cir. 1978) (work release involves a liberty interest). Similarly, many administrative decisions concerning a prisoner may affect his opportunity for parole or the amount of personal freedom he enjoys within the prison. The courts of appeals do not agree whether the Bureau of Prisons must afford hearings concerning these decisions. Some courts hold that hearings are necessary. See *Polizzi* v. *Sigler*, 564 F.2d 792 (8th Cir. 1977); *Cardaropoli* v. *Norton*, 523 F.2d 990 (2d Cir. 1975). Other courts conclude that the Constitution does not require hearings. See *Solomon* v. *Benson*, 563 F.2d 339 (7th Cir. 1977), overruling *Holmes* v. *United States Board of Parole*, 541 F.2d 1243 (7th Cir. 1976); *Walker* v. *Hughes*, 558 F.2d 1247 (6th Cir. 1977); *Marchesani* v. *McCune*, 531 F.2d 459 (10th Cir.), cert. denied, 429 U.S. 846 (1976). Cf. *King* v. *Warden*, 551 F.2d 996 (5th Cir. 1977). See also *Moody* v. *Daggett*, 429 U.S. 78, 88 n.9 (1976).

reduced by good time credits. Neb. Rev. Stat. § 83-1, 110 (1976). Each prisoner, whether or not eligible for parole, receives a yearly parole review hearing. Neb. Rev. Stat. § 83-192(9) (1976). In addition, each inmate has a parole review hearing within 60 days of becoming eligible for parole. Neb. Rev. Stat. § 83-1,111(1) (1976). After the interview, the Board notifies each inmate whether he will be granted a formal parole hearing. If a formal hearing is not granted, the Board tells the prisoner why release was deferred and makes recommendations concerning how the prisoner may correct any deficiencies.

If the Board determines that a formal parole hearing is warranted, it notifies the inmate of the month in which the formal hearing will be held. The inmate learns the exact day and time of the hearing only on the day it takes place. At the hearing the inmate may offer evidence and may be assisted by counsel. Neb. Rev. Stat. § 83-1,112(2) (1976). The Board maintains a complete record of the procedings. Neb. Rev. Stat. § 83-1,111(1) (1976). If parole is denied, the Board must furnish the prisoner within 30 days with a written statement of the reasons for the denial. Neb. Rev. Stat. § 83-1,111(2) (1976).

The Board's decision is governed by the statutory direction that an inmate eligible for parole "shall be released" unless the Board makes at least one of the following four findings:

> (a) There is a substantial risk that [the prisoner] will not conform to the conditions of parole;

(b) His release would depreciate the seriousness of his crime or promote disrespect for law;

(c) His release would have a substantially adverse effect on institutional discipline; or

(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

Neb. Rev. Stat. § 83-1,114(1) (1976). The statute also identifies numerous factors that the Board must consider in arriving at its decision.[4]

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[4] Neb. Rev. Stat. § 83-1,114(2) (1976) provides:

In making its determination regarding a committed offender's release on parole, the Board of Parole shall take into account each of the following factors:

(a) The offender's personality, including his maturity, stability, sense of responsibility and any apparent development in his personality which may promote or hinder his conformity to law;

(b) The adequacy of the offender's parole plan;

(c) The offender's ability and readiness to assume obligations and undertake responsibilities;

(d) The offender's intelligence and training;

(e) The offender's family status and whether he has relatives who display an interest in him or whether he has other close and constructive associations in the community;

(f) The offender's employment history, his occupational skills, and the stability of his past employment;

(g) The type of residence, neighborhood or community in which the offender plans to live;

(h) The offender's past use of narcotics, or past habitual and excessive use of alcohol;

[Footnote continued on page 9]

2. Respondents filed the present suit as a class action in the United States District Court for the District of Nebraska. They contended that the Due Process Clause requires procedures more elaborate than those followed by the Board, and they requested both an injunction and damages. Respondents contended that the Constitution requires the Board to (Pet. App. 25-26): (1) inform prisoners of the criteria governing release decisions; (2) inform prisoners in advance of the dates and times of their hearings; (3) permit prisoners to present evidence (through documents and witnesses); (4) "confront the inmates" with adverse evidence; (5) allow prisoners to cross-examine any adverse witnesses; (6)

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[4] [Continued]

(i) The offender's mental or physical makeup including any disability or handicap which may affect his conformity to law;

(j) The offender's prior criminal record, including the nature and circumstances, recency and frequency of previous offenses;

(k) The offender's attitude toward law and authority;

(l) The offender's conduct in the facility, including particularly whether he has taken advantage of the opportunities for self-improvement, whether he has been punished for misconduct within six months prior to his hearing or reconsideration for parole release, whether any reductions of term have been forfeited, and whether such reductions have been restored at the time of hearing or reconsideration;

(m) The offender's behavior and attitude during any previous experience of probation or parole and the recency of such experience; and

(n) Any other factors the board determines to be relevant.

maintain a complete record of all proceedings; (7) permit representation of prisoners by attorneys in all proceedings; (8) provide explicit statements of reasons for the denial of release; and (9) inform prisoners of the evidence relied on in denying release.[5]

After some preliminary proceedings (Pet. App. 25 n.2), the district court held that all prisoners have a "liberty" interest in release on parole (*id.* at 29-36). In light of this interest, the court held, the Due Process Clause requires parole authorities to follow certain minimum procedures (*id.* at 39-44): (1) every eligible inmate must receive a full parole hearing; (2) the inmate must receive notice, at least 72 hours before the hearing, of the hearing's date, and the notice must include a statement of the factors to be considered by the Board; (3) subject to considerations of prison security, the inmate must be allowed to appear and present evidence, including witnesses; (4) the Board must create written records of the hearings; (5) within a reasonable time after the hearing, the Board must give each inmate a written notice of the reasons for its decision and of the evidence on which it relied. The court denied respondents' request for money damages (*id.* at 47).

3. The court of appeals agreed with the district court that the inmates have a liberty interest in their applications for release on parole, but it based this decision on the particular aspects of Nebraska law

[5] Respondents also challenged the State's work release procedures, but this portion of the suit was dismissed for failure to join an essential defendant. Pet. App. 26-27.

creating the entitlement (Pet. App. 4-14). The court held that "Neb. Rev. Stat. § 83-1,114 provides the inmates with a justifiable expectation rooted in state law that they will be conditionally released if they meet the statutory standards" (*id.* at 13).[6]

[6] Portions of the court's opinion appear to agree with the district court that all prisoners have a liberty interest in their desire to be released on parole, regardless of the provisions of state law. See, *e.g.*, Pet. App. 6 ("[t]he nature of the interest at stake in both parole release and parole revocation is the same—conditional liberty versus incarceration—and thus the Fourteenth Amendment applies to both"). But other portions of the court's opinion expressly place reliance on the provisions of state law. See, *e.g.*, the passage quoted in the text and Pet. App. 7 (Nebraska law "provides that a prisoner eligible for parole is to be released on parole unless he is found to be unfit for one of the reasons listed in the statute. Thus, the Board's decision of whether to grant parole necessitates a factual determination"), *id.* at 9 ("[t]he inmates' interest in this case is the right to be considered for parole, a right created by Nebraska law").

In a more recent decision the court held that Missouri law, which does not contain a presumption in favor of release but which sets out rudimentary criteria for parole officials to consider, also creates a liberty interest. The court stated that the Nebraska and Missouri statutes both "create a justifiable expectation rooted in state law that if the statutory criteria are satisfied the inmate will be released on parole." *Williams* v. *Missouri Board of Probation and Parole*, No. 78-1136 (8th Cir. Oct. 27, 1978), slip op. 5. The court concluded that this "justifiable expectation" is a liberty interest, and that the Due Process Clause therefore applies. In extending the coverage of the Clause to a parole system that does not contain a presumption in favor of release—or indeed any criteria that will call for release—the court in *Williams* overruled sub silentio two earlier decisions. See *Kelsey* v. *Minnesota*, 565 F.2d 503, 506-507 n.3 (8th Cir. 1977) ("[i]f a parole board refuses to grant parole, [an] inmate has suffered no deprivation"); *Barnes* v. *United States*, 445 F.2d 260 (8th Cir. 1971).

The court of appeals then addressed the question of what process is due. The court concluded that the prisoner's interest in being released is substantial (Pet. App. 15). The Board's interest in avoiding cumbersome procedures, the court thought, also is important, but it believed that additional procedures would not be detrimental to the Board's operations because the Board, like the prisoner, has an interest "in seeing that parole is neither granted nor denied on the basis of inaccurate information or an erroneous evaluation" (*ibid.*).

The court held that the Board must give each prisoner a formal parole hearing when he first becomes eligible for parole, but that it need not hold additional hearings if it denies parole at the first eligibility (Pet. App. 16-17). The Constitution also requires formal notice, at least 72 hours in advance, of the "date and hour for * * * the hearing" (*id.* at 17), so that the prisoner may have a "fair opportunity to prepare for his appearance before the Board" (*id.* at 18). The court held that this notice "must be accompanied by a listing of the criteria governing the Board's * * * decisions," because such notice "is only fair" (*ibid.*). The statutory criteria themselves give sufficient notice, the court reasoned, so that this constitutional requirement means only that the Board must provide each inmate with a copy of the statute (*ibid.*).

The court next held that "[s]ubject to prison security considerations an inmate must be allowed to appear in person before the Board and to present

documentary evidence" (Pet. App. 19). The right to make a presentation would not be effective, the court reasoned, unless the prisoner could appear in person. But, it went on, "in the absence of exceptional circumstances the prisoner does not have a constitutional right to call witnesses in his behalf" (*ibid.*). The court suggested that the Board exercise its discretion to permit the calling of witnesses (*id.* at 20).

The court held that a tape recording of the hearing is sufficient to satisfy the constitutional requirement that a record of the proceedings be kept, so long as the recording is of sufficient quality to permit written transcription (Pet. App. 20).

Finally, the court concluded, the Board must give the prisoner a written statement of reasons if it denies parole (Pet. App. 20). This statement need not include detailed findings of fact, the court stated, but must inform the prisoner of the "essential facts relied on by the Board in reaching its decision" (*id.* at 21). The court reasoned that this constitutional requirement facilitates judicial review of parole decisions, induces the Board to think about its decisions, promotes the goal of rehabilitation by informing the prisoners how they can improve their chance of release, and promotes the development of a body of administrative precedent (*id.* at 21-22).

The district court had rejected respondents' argument that the Due Process Clause requires the presence of counsel and an opportunity to confront and cross-examine adverse witnesses (Pet. App. 38 n.8). Because respondents did not cross-appeal from the

district court's decision, the court of appeals had no occasion to consider whether the Constitution requires these procedures.

INTRODUCTION AND SUMMARY OF ARGUMENT

Parole release decisions are of great importance to each prisoner, and it is concomitantly important that such decisions be made only after studied deliberation and hearings that minimize the chance that the decisions will be based on misapprehensions of fact or mistaken judgment. For that reason, the federal Parole Commission provides hearings calculated to solicit the views of prisoners and to keep them informed of the standards by which decisions will be made and the reasons for the decision in their particular cases. The court of appeals, seeking to improve the quality of parole release decisions in the states, has required Nebraska's Board of Parole to follow procedures similar to those of the Commission.

But the question here is not whether more elaborate procedures would be wise, but rather whether the task of defining and implementing the government's policy with regard to parole proceedings is vested by the Constitution in the legislative and executive branches, or rather in the courts under the Due Process Clause. That hearings, access to evidence, detailed statements of reasons and other formal procedures may improve the comprehensiveness and accuracy of a parole board's fact-gathering and decision-making functions does not answer this question, for there is no abstract constitutional right to be free of procedures that entail significant risks of error. Due process rights are implicated only when liberty or property is at stake.

Legislatures and administrators, as well as courts, are sensitive to the legitimate needs and desires of prison inmates. Congress recently enacted the Parole Commission and Reorganization Act, which affords prisoners many rights. Congress believed that its action struck a fair balance between the legitimate interests of the inmate and the needs of society for protection and deterrence. See S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 20-28 (1976). Nebraska also affords each prisoner a personal interview, but its procedures differ in other respects from those used by federal authorities. As we learn more about the results of the procedures now in use, or as ideas concerning the role of prisons in our society evolve, still other procedures may come to appear desirable. The United States believes that the choice of procedures usually is constitutionally within the province of the legislature and the executive, which have the better opportunity to study the procedures in use and to evaluate their merits and demerits. If, however, a legislative elects to create a legitimate claim of entitlement to parole, then parole procedures become subject to judicial scrutiny. In our view Nebraska, but not the United States, has made such a choice, by creating for eligible inmates a statutory entitlement to early release.

Over the past several decades society's views with regard to crime and the purposes of imprisonment have undergone considerable change; ideas concerning

the proper role of parole, and the proper procedures to use in considering parole, have changed with them.[7] We do not yet know which parole release process is best; indeed, social science research is barely adequate to enable us to frame the pertinent questions.[8] The

[7] Punishment and retribution once were viewed as the major justifications of imprisonment, but society adopted rehabilitation and then deterrence as substitute rationales. See *United States* v. *Grayson*, No. 76-1572 (June 26, 1978), slip op. 4-10; *Williams* v. *New York*, 337 U.S. 241 (1949); F. Zimring & G. Hawkins, *Deterrence* (1973). Many scholars have subjected all of these rationales—and the penalty of imprisonment itself—to scrutiny. The emerging consensus appears to concentrate on deterrence and "desert" as justifications for punishment and suggests that fines and determinate sentences are the best punishments. See generally H. L. A. Hart, *Punishment and Responsibility* 1-27, 158-237 (1969); N. Morris, *The Future of Imprisonment* (1974); H. Packer, *The Limits of the Criminal Sanction* 17-102 (1968); E. van den Haag, *Punishing Criminals* (1975); A. von Hirsch, *Doing Justice* (1976); J. Wilson, *Thinking About Crime* (1975). See also K. Elzinga & W. Breit, *The Antitrust Penalties* 97-138 (1976); R. Posner, *Economic Analysis of Law* 164-172 (2d ed. 1977).

Dean Morris suggests that presumptive release dates be set early during an offender's imprisonment and that the release dates not depend on the offender's institutional behavior. The Parole Commission's experimental practices are based on Dean Morris's analysis, and, under this system, little purpose is served by detailed adversarial hearings. Von Hirsch suggests that parole be abolished or converted into a system that is almost automatic; if this system is adopted there would be little point in holding release hearings. See A. von Hirsch, *Abolish Parole?* (1978).

[8] Compare D. Stanley, *Prisoners Among Us: The Problem of Parole* (1976) (surveying the practices of federal and state parole systems and recommending the abolition of parole), with Project, *Parole Release Decision-making and the Sentencing Process*, 84 Yale L.J. 810 (1975) (assessing release decisions under the federal parole release guidelines).

needed knowledge can be acquired, if at all, only by a painstaking process of experimentation, change, trial, and error, similar to that in which the federal Parole Commission is engaged. Perceptions of the role of imprisonment and of the objectives it can and should accomplish can be expected to continue to change. So will ideas about the proper place of parole and the proper way to go about deciding when to grant parole. Decisions on these and similar questions are best left to society at large and to the representatives they elect, unless the Constitution requires otherwise in this case.

I

A. The court of appeals' requirement of more elaborate parole procedures was based on the Due Process Clause of the Fourteenth Amendment. But that Clause applies only where governmental action threatens to deprive an individual of "liberty" or "property." Thus the evaluation of the case must begin with an inquiry into whether the denial of parole deprives respondents of a constitutionally protected liberty or property interest.

B. Denial of parole does not deprive a prisoner of liberty. He was lawfully deprived of his liberty on conviction, sentence, and incarceration—all processes that are surrounded by elaborate constitutional safeguards. The denial of parole simply continues the prisoner's incarceration for a period within the term already constitutionally imposed.

Certainly a prisoner is interested in securing his release on parole. But a prisoner's desire to obtain

his freedom from confinement is not, without more, constitutionally cognizable as a "liberty" interest. The values that underlie the analysis of claims of "liberty" interests in non-prisoner cases do not, by and large, pertain to persons lawfully confined. See *Meachum* v. *Fano*, 427 U.S. 215 (1976). A prisoner's legally protected interests relating to release are founded not on constitutional concepts of liberty but on the statutes, regulations, and rules that govern the terms of his confinement. Apart from concerns under the Cruel and Unusual Punishment Clause of the Eighth Amendment, a prisoner has no protected liberty interest unless those statutes, regulations, and rules create legitimate claims of entitlement.

This Court's decisions make clear that a legitimate claim of entitlement warranting the procedural protections of due process exists only when the state has bound itself to take, or refrain from taking, specified actions on the basis of determinable facts or specific findings. See *Moody* v. *Daggett*, 429 U.S. 78 (1976); *Meachum* v. *Fano*, *supra*. As Mr. Justice White noted in his concurring and dissenting opinion in *Arnett* v. *Kennedy*, 416 U.S. 134, 181 (1974):

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

It is likewise clear that a legitimate claim of entitlement arises only from substantive law and not from any person's unilateral expectation.

C. Nebraska law provides that an inmate "shall be released" on parole at the expiration of a minimum term, reduced by good time credits, unless the Board of Parole finds the existence of one or more of four factors spelled out in the statute. This statutory presumption in favor of release limits the Board's discretion and gives the prisoner a legitimate claim of entitlement to be released, subject to defeasance only if the Board satisfies the statutory criteria. Under the analysis of six Justices in *Arnett* v. *Kennedy*, *supra*, a statutory presumption of this sort creates a "property" interest protected by the Due Process Clause. Accordingly, although we submit that most parole systems, including the federal system, involve neither liberty nor property, and thus are not subject to the procedural requirements of the Due Process Clause, we conclude that Nebraska's unusual system creates such an interest.

II

Once a court has concluded that a governmental decision may deprive a person of liberty or property, it must decide what process is due. Because respondents did not appeal from the portion of the district court's decision that was adverse to them, the Court need not decide in this case whether the Constitution requires the elaborate procedures specified by the Court in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), for the revocation of parole or whether, instead, the appropriate procedures should be modeled on those that the Court selected in *Wolff* v. *McDonnell*, 418

U.S. 539 (1974), and *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), for use when hearings held within prison walls may affect the length of confinement.

The court of appeals here has required procedures that are quite similar to those of *Wolff* and *Baxter*. We therefore believe that its judgment should be affirmed in most respects. But the court exceeded constitutional requirements in ordering state officials to hold oral hearings in every case at the first possible opportunity. In some cases it will be clear from written files that the prisoners have no hope of being paroled; in such cases there is no need for an oral hearing. Moreover, although this Court often has held that the Due Process Clause requires a simple statement of reasons, it never has held that the Clause requires administrative officials to summarize the evidence that supports their decisions. In these two respects, therefore, the decision of the court of appeals should be reversed.

ARGUMENT

I

THE PROCEDURAL PROTECTIONS OF THE DUE PROCESS CLAUSE APPLY TO PAROLE RELEASE DECISIONS ONLY IF THE PAROLE STATUTE CREATES AN ENTITLEMENT TO EARLY RELEASE

Parole is a statutory creation. The rules under which an inmate is entitled to be considered for parole are designed by each state and, for federal inmates, by Congress. A state could design a parole system

under which the parole decision is committed to the unfettered discretion of the parole authorities. The use of such a discretionary system of parole, although it might create in inmates an expectation of early release, would not create legitimate claim of entitlement to release. The United States and most of the states employ such a discretionary system. See 28 C.F.R. 2.18.

But a state also could design a parole system under which every prisoner becomes entitled to early release unless state officials can establish some good reason for denying release. Nebraska has such a system. The State's statute provides that every prisoner eligible for parole shall be released unless the Board finds that one of the statutory criteria sufficient to deny release has been established. Because Nebraska's inmates have a justifiable expectation of early release grounded in state law, the Due Process Clause requires that they be provided with certain procedural protections before the State can act to disappoint the statutory expectation.

A. The Procedural Protections of the Due Process Clause Apply Only to Proceedings That may Result in the Deprivation of a Person's "Liberty" or "Property"

The procedural protections of the Due Process Clause do not extend to all situations in which governmental action or inaction may be adverse to the interests of a particular person or group. By its terms, the Clause applies only in those circumstances in which governmental action threatens to deprive a

person of "liberty" or "property." [9] Accordingly, this Court, in evaluating claims of right to procedural due process, has been careful to identify the nature of the interests at stake. The Court explained in *Meachum* v. *Fano*, 427 U.S. 215 (1976), that the range of interests properly characterized as liberty or property is finite and that, particularly when prisoners are involved (*id.* at 215; emphasis in original):

> To hold that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts.

See also *Moody* v. *Daggett*, 429 U.S. 78, 88 n.9 (1976).

Perhaps the paradigm case is *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Roth had been hired for an academic year by Wisconsin State University; the University declined to renew his contract, and Roth brought suit, claiming that he was entitled to notice of charges and a hearing on the nonrenewal. The Court agreed with Roth that he possessed an "interest" in continued employment, in the sense that termination of employment is a "grievous loss." But that fact, the Court held, was not determinative of

[9] We need not discuss here the special situation in which the governmental action threatens to deprive a person of his life. See generally *Gardner* v. *Florida*, 430 U.S. 349 (1977).

the due process question (408 U.S. at 570-571; emphasis in original):

> [T]o determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake. * * * We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

The Court then determined that Roth's interest in continued employment—his desire to obtain a renewal of his contract—was neither a "liberty" nor a "property" interest, and therefore that he could be deprived of that interest without due process.

The *Roth* decision illustrates that a showing of "grievous loss" may be a necessary condition for the invocation of due process safeguards, but it is not a sufficient one. Thus, although a prisoner's "interest" in being released on parole is substantial, it cannot be dispositive of the due process claim in this case. To the contrary, the evaluation of any due process claim must begin with an inquiry into whether the interest of which the person may be deprived is a liberty or property interest. See *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 838-841 (opinion of the Court), 856-864 (Stewart, J., concurring) (1977); *Meachum* v. *Fano*, *supra*; *Goss* v. *Lopez*, 419 U.S. 565, 572-576 (1975). We turn to that inquiry.

B. Except to the Extent That he may Have a Legitimate Claim of Entitlement Grounded in the Statutes, Regulations, or Rules Governing the Terms of his Confinement, a Prisoner has no Liberty or Property Interest in Being Released on Parole

It may at first blush appear paradoxical to assert that a prisoner has no "liberty" interest in being released from confinement on parole. The most elementary form of liberty, freedom from the state's physical control, is at stake in the parole decision. But the threshold question under the Constitution is whether an adverse parole decision "deprives" the prisoner of liberty he possesses or to which he is entitled. The answer, we believe, is that it does not.

Meachum v. *Fano*, *supra*, demonstrates that, "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty" (427 U.S. at 224). "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston*, 334 U.S. 266, 285 (1948). See also *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977). A prisoner loses his "liberty" when he is lawfully placed in the state's custody, and his interest in freedom from confinement is not revived until he is released.[10]

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[10] This is not to say that a prisoner retains no constitutionally cognizable liberty interests. Cf. *Procunier* v. *Martinez*, 416 U.S. 396 (1974); *Wolff* v. *McDonnell*, 418 U.S. 539, 555-556 (1974).

This consideration distinguishes the denial of parole from its revocation. A prisoner's generalized liberty interest in freedom has been extinguished for the lawful term of confinement. Parole, once granted, revives that interest. At a parole revocation proceeding, the parolee attempts to defend his liberty, albeit conditional, against those who would take it from him; "execution of the [parole violator's] warrant and custody under that warrant [are] the operative events triggering any loss of liberty attendant upon parole revocation. This is a functional designation, for the loss of liberty * * * does not occur until the parolee is taken into custody under the warrant." *Moody* v. *Daggett*, *supra*, 429 U.S. at 87. See also *Morrissey* v. *Brewer*, 408 U.S. 471, 480-482 (1972); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973). A prisoner seeking parole, however, has no generalized "liberty" interest in the parole board's decision, for he is not at liberty and does not stand to lose any liberty as a result of that decision. In short, the fact that a prisoner's freedom may be affected does not, in and of itself, mean that a constitutionally protected liberty interest is at issue.

Wolff v. *McDonnell*, 418 U.S. 539 (1974), supports this analysis. The question in *Wolff* was whether the protections of due process extend to prison disciplinary proceedings that may result in the reduction of a prisoner's statutory good-time credits. This Court held that the protections of due process do apply to such proceedings. But the Court's decision did not turn on the mere fact that a reduction in good-time

credits might affect the timing of the prisoner's release; the Court did not conclude that the prospect of release from prison is constitutionally protected liberty. Instead, the Court focused narrowly on the nature and source of the prisoner's interest in the retention of his accumulated good-time credits. Because that interest was created by statute, and by statute could be extinguished only "[i]n cases of flagrant or serious misconduct" (418 U.S. at 546), the Court determined that "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated" (418 U.S. at 557).

This approach makes the existence of a liberty interest turn on the difference between personal expectation and statutory entitlement. It has been confirmed by recent cases. *Meachum* v. *Fano, supra,* held that a prisoner has no right to a hearing concerning his transfer to a prison the conditions of which are substantially less favorable to him. Because state law "conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct[,] * * * [t]he predicate for invoking the protection of the Fourteenth Amendment * * * [was] totally nonexistent" (427 U.S. at 226-227). Similarly, in *Smith* v. *Organization of Foster Families, supra,* the Court rejected the district court's conclusion that the magnitude of a person's interest is sufficient to require procedural protections, pointing out that the existence of even a very important interest "does not, in and of itself, implicate the due process guarantee" (431 U.S. at 840). The Court has "rejected the notion that every state action carrying adverse consequences for prison inmates automatically activates a due process right" (*Moody* v. *Daggett, supra,* 429 U.S. at 88 n.9).

Meachum, Moody and *Wolff* recognize that the generalized interest in personal freedom from restraint is part of "liberty" only for the general population and not, in the main, for persons lawfully confined. A prisoner's interests relating to release are based not on constitutional concepts of liberty but on the statutes, regulations, and rules that govern the terms of his confinement. Except to the extent that those statutes, regulations, and rules create a legitimate claim of entitlement to release, a prisoner has no liberty or property interest in obtaining an early release from confinement to which the procedural protections of due process could pertain. Accordingly, although a prisoner's interests in release from confinement may for purposes of convenience be called "liberty" interests, they are simply entitlements created by positive law.[11] Once a prisoner has

[11] Indeed, this may also be true with respect to a parolee's interest in retaining his freedom. In *Morrissey* v. *Brewer, supra,* a case that purportedly turned on the parolee's "liberty" interest, the right of which the parolee would be deprived by wrongful revocation was in fact a statutorily created "property" interest—the entitlement to remain at

been released on parole, he has a legitimate claim of entitlement—created by positive law—not to be reimprisoned unless he violates the terms and conditions of his release. A prisoner seeking release in the first instance has such an interest only if the state creates it.

In short, whatever the scope of Fourteenth Amendment "liberty" interests may be in other cases, a prisoner's interest relating to release from confinement, to be constitutionally entitled to the procedural protections of due process, must rest on a legitimate claim of entitlement grounded in the statutes, regulations, or rules governing the terms of his confinement. Thus the analysis to be applied here must be similar to that employed by this Court in decisions involving the assertion of property interests.

Those decisions make it clear that a property interest arises only when the condition limiting the Executive's freedom of action exists in substantive law and not merely in the hopes or expectations of the person. This Court in *Roth* explicitly rejected the argument that a property interest could arise merely from the individual's need, desire, or expectation (408 U.S. at 577):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

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large unless and until it was demonstrated that he had violated the terms of his parole. See *Moody* v. *Daggett, supra,* which analyzed impending parole revocations in these terms.

See also *Smith* v. *Organization of Foster Families, supra,* 431 U.S. at 860 (Stewart, J., concurring); *Meachum* v. *Fano, supra,* 427 U.S. at 228.

A legitimate claim of entitlement exists only when the state has bound itself, either by statute, regulation, rule, or well-settled course of practice, to take, or refrain from taking, specified actions on the basis of determinable facts or specific findings. So, for example, in *Morrissey* v. *Brewer, supra,* the parolee had a statutory right to remain free unless he violated the terms of his parole; in *Goss* v. *Lopez, supra,* the student had a statutory right to attend school unless he was guilty of misconduct; in *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), the employee could be terminated only for cause; in *Perry* v. *Sindermann,* 408 U.S. 593 (1972), the teacher asserted a well-settled practice of reemployment absent "sufficient cause." [12] Where the state has bound itself to extend or confer a benefit, or withhold a sanction, on the determination of a particular set of facts, the Due Process Clause requires the implementation of procedures designed to ensure that those findings will be

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[12] See also *Memphis Light, Gas & Water Division* v. *Craft,* 436 U.S. 1, 9-12 (1978) (receipt of water is a property interest because statute guarantees service as long as bill is paid) *Dixon* v. *Love,* 431 U.S. 105, 112-113 (1977) (driver's license is a property interest because it could be revoked only for cause); *Ingraham* v. *Wright,* 430 U.S. 651, 672-674 (1977) (a student has a liberty interest in his bodily integrity); *Mathews* v. *Eldridge,* 424 U.S. 319, 332 (1976) (a person has a property interest in disability benefits because his entitlement turns on specific facts); *Richardson* v. *Perales,* 402 U.S. 389, 401-402 (1971) (same).

made fairly and accurately. That is why the Court held in *Morrissey* that the Due Process Clause applies to revocations of parole, which turn on a finding of violation of the terms of release.

On the other hand, where the state has not set up rules that make particular decisions turn on particular findings, there can be no legitimate claim of entitlement. In *Meachum* v. *Fano*, for example, the state had discretion to transfer the prisoner without regard to his misconduct, and no set of facts he could prove would entitle him to remain at the place of original incarceration. In *Board of Regents* v. *Roth*, the University had discretion not to reemploy the teacher, and no set of facts he could prove would entitle him to stay on the job. When there is no statutory presumption and no determinable set of facts that could give rise to an entitlement, the process of determining the facts cannot result in the deprivation of any entitlement; in such circumstances, the procedural protections of due process are not implicated. As Mr. Justice White noted in his concurring and dissenting opinion in *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 181:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

We turn, therefore, to an application of these principles to the facts of this case.

C. Nebraska Law Gives Prisoners Eligible for Parole a Legitimate Claim of Entitlement to Release

Application of the test we have outlined above to the parole procedures of most states, and of the United States, leads to the conclusion that prisoners have no legitimate claim of entitlement to release, and that the Due Process Clause therefore does not apply. We have taken that position with respect to the parole systems of North Carolina,[13] Kentucky,[14] New York,[15] and the United States.[16] We adhere to that position. Under most systems of parole consideration, the decision to postpone further parole consideration for a particular period of time depends on a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done." Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803, 813 (1961). Parole may be granted or denied "for a variety of reasons [that] often involve no more than informed predictions as to what would best serve [penological purposes] or the safety and welfare of the inmate." *Meachum* v. *Fano*, *supra*, 427 U.S. at 225.

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[13] Brief for the United States as *amicus curiae* in *Weinstein* v. *Bradford*, 423 U.S. 147 (1975).

[14] Brief for the United States as *amicus curiae* in *Scott* v. *Kentucky Parole Board*, 429 U.S. 60 (1976).

[15] Brief for the United States as *amicus curiae* in *New York State Parole Board* v. *Coralluzzo*, cert. dismissed as improvidently granted, 435 U.S. 912 (1978).

[16] *Id.* at 31 n.15.

Unless a parole system sets up a presumption in favor of release or specifies particular facts that govern the release decision, the parole system could not involve a legitimate claim of entitlement to release. So long as the system of release is fundamentally an exercise of informed discretion, no fact or set of facts that a prisoner could prove would establish an entitlement to have parole authorities place trust in his character or believe that the interests of society require his release.[17] Because the

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[17] The federal Parole Commission's guidelines articulate some objective criteria that influence release decisions. These guidelines do not, however, diminish the Commission's discretion or give any prisoner a legitimate claim of entitlement to release. They indicate a convenient point of reference, a "normal" range of release times, but the Commission is free at any time, and for any constitutionally permissible reason, to depart from these ranges. See 28 C.F.R. 2.18 ("[t]he granting of parole to an eligible prisoner rests in the discretion of the United States Parole Commission"); 28 C.F.R. 2.20(c) (the "time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered").

Because the Parole Commission has not made the exercise of its discretion turn on the presence or absence of determinable facts, a federal prisoner has no legitimate claim of entitlement to release. A more difficult problem arises with respect to a contention by a prisoner that he should be released no later than the maximum time set by the guidelines for cases similar to his. Congress has provided in 18 U.S.C. 4206(c) that the Commission may deny release notwithstanding the guidelines "if it determines that there is good cause for so doing * * *." That "good cause" requirement, like the requirement of *Arnett* v. *Kennedy, supra,* may give the prisoner some claim of entitlement to release, subject to defeasance only for good cause. But, because the Commission retains

parole decision usually is not controlled by any particular controvertible facts, prisoners usually have no liberty or property interest in being granted parole at any particular time.[18]

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substantial discretion to determine "good cause," and because "good cause" itself may involve subjective judgments that are not capable of proof or disproof, it may be that the prisoner's only entitlement is to thorough consideration and a statement of reasons, rather than to release. If the prisoner's entitlement is so viewed, the Due Process Clause would not necessarily apply.

The federal parole system does, however, create one clear liberty or property interest. 18 U.S.C. 4206(d) establishes a presumption in favor of release after a prisoner has served two-thirds of his sentence, or 30 years' imprisonment, whichever is less. This operates much like Nebraska's system, and it creates a legitimate claim of entitlement for the reasons discussed in the text.

[18] The courts of appeals are divided on the question whether the Due Process Clause applies to the processing of applications for parole. The Third, Fifth, Sixth, Ninth and Tenth Circuits hold that it does not. See *Mosley* v. *Ashby,* 459 F.2d 477 (3d Cir. 1972); *Madden* v. *New Jersey State Parole Board,* 438 F.2d 1189 (3d Cir. 1971); *Cruz* v. *Skelton,* 543 F.2d 86 (5th Cir. 1976); *Brown* v. *Lundgren,* 528 F.2d 1050 (5th Cir.), cert. denied, 429 U.S. 917 (1976); *Scarpa* v. *United States Board of Parole,* 477 F.2d 278 (5th Cir.) (en banc), vacated as moot, 414 U.S. 809 (1973); *Scott* v. *Kentucky Parole Board,* No. 74-1899 (6th Cir. Jan. 15, 1975), remanded to consider mootness, 429 U.S. 60 (1976), reaffirmed *sub nom. Bell* v. *Kentucky Parole Board,* 556 F.2d 805 (1977), cert. denied, 434 U.S. 960 (1978); *Walker* v. *Hughes, supra; Dorado* v. *Kerr,* 454 F.2d 892 (9th Cir. 1972); *Schawartzberg* v. *United States Board of Parole,* 399 F.2d 297 (10th Cir. 1968). But cf. *Hill* v. *Attorney General of the United tSates,* 550 F.2d 901 (3d Cir. 1977) (by discussing the constitutional adequacy of reasons given for denial of parole, the court implies that the Due Process Clause applies).

[Footnote continued on page 34]

Nebraska law, however, follows a different pattern. The pertinent statute (Neb. Rev. Stat. § 83-1,111(1) (1976)) provides that every prisoner shall have a release hearing "within sixty days before the expiration of his minimum term less any reductions." Neb. Rev. Stat. § 83-1,114(1) (1976), then

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[18] [Continued]

The Second, Fourth, Seventh and District of Columbia Circuits, on the other hand, have held that the expectation of parole release always is a form of liberty that cannot be denied without procedural protections. Each court has reached this conclusion by a process that indicates that the details of a particular parole program are irrelevant; each court considers the prospect of personal freedom after parole, by itself, to be the "liberty" interest involved. See *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole,* 500 F.2d 925 (2d Cir. 1974), vacated as moot, 419 U.S. 1015 (1975); *Coralluzzo* v. *New York State Parole Board,* 566 F.2d 375 (2d Cir. 1977), cert. dismissed as improvidently granted, 435 U.S. 912 (1978); *Bradford* v. *Weinstein,* 519 F.2d 728 (4th Cir. 1974), vacated as moot, 423 U.S. 147 (1975); *Franklin* v. *Shields,* 569 F.2d 784 (4th Cir. 1977) (en banc), cert. denied, 435 U.S. 1003 (1978); *United States ex rel. Richerson* v. *Wolff,* 525 F.2d 797 (7th Cir. 1975); *Childs* v. *United States Board of Parole,* 511 F.2d 1270 (D.C. Cir. 1974).

A closely related question is whether the setting of a tentative release date establishes a "liberty" interest so that hearings are required before the date can be altered. Compare *Sexton* v. *Wise,* 494 F.2d 1176 (5th Cir. 1974), and *McIntosh* v. *Woodward,* 514 F.2d 95 (5th Cir. 1975) (no liberty interest until actual release), with *Drayton* v. *McCall,* No. 78-2030 (2d Cir. Oct. 2, 1978), and *Robinson* v. *Benson,* 570 F.2d 920 (10th Cir. 1978) (setting of tentative release date creates a liberty interest). The Solicitor General is considering whether to authorize the filing of a petition for a writ of certiorari in *Drayton.*

provides that "[w]henever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because [of one of several enumerated possibilities]." These two statutes, read together, give every Nebraska prisoner a legitimate claim of entitlement to release on parole, subject to defeasance only if the parole authorities find one of a limited number of things.

This presumption in favor of release—missing from the federal parole statute and from most other state statutes—operates much like the system of good-time credits at issue in *Wolff* v. *McDonnell, supra.* The state statute creating good-time credits gave every inmate an entitlement to early release; the entitlement could be withdrawn only on the occurrence of specified circumstances (usually misconduct). The Court held that this system of entitlements was a form of liberty or property (418 U.S. at 546).

Under Nebraska law the system of good-time credits and the system of parole differ in the nature of the findings that are sufficient to withhold early release. Only serious misconduct justifies withdrawing good-time credits; a number of more diffuse and discretionary criteria may be invoked to deny early release on parole. Petitioners argue that this difference prevents a conclusion that the statutory presumption in favor of parole creates a legitimate claim of entitlement. Cf. *Meachum* v. *Fano, supra,* 427 U.S. at 226-227.

But *Meachum* involved essentially unbridled discretion; the Court held that the Due Process Clause did not apply to transfers from one prison to another because there was no rule giving a prisoner an entitlement to reside in any particular prison. Here, however, there is a statutory presumption in favor of parole; administrative discretion is not unbridled. The Nebraska parole statute is quite similar to the federal statute involved in *Arnett* v. *Kennedy, supra*, and in *Arnett* six Justices concluded that the statute had created a property interest.

Arnett involved federal employment. The governing statute provided that a person who had completed a probationary term of employment had an expectation that he would continue to be employed. He could be fired or suspended "only for such cause as will promote the efficiency of the service." 5 U.S.C. 7501. Although this requirement of "good cause" is surely vague, and calls for discretionary decisions, the Court held that, when coupled with the statutory presumption in favor of continued employment, the statute set up a property interest that could be terminated only in accord with procedures established by the Due Process Clause. See 416 U.S. at 165-166 (opinion of Powell, J.), 177-186 (opinion of White, J.), 207-211 (Marshall, J., dissenting). Here, as in *Wolff* and *Arnett*, a statute has created an expectation that the state may not disappoint without following procedures required by the Due Process Clause.[19]

[19] Although we have argued above that other statutes, without the presumption in favor of release found in Nebraska's

statute, do not create a legitimate claim of entitlement to release, we do not argue that no constitutionally protected interest is involved in the federal parole process and the process of these other states. Under federal law, and the law of most states, an inmate has a right to be considered for parole at a particular time. The government may not refuse to consider a prisoner for parole, or change the date of eligibility for consideration, without due process. But this case does not involve a contention that any person, otherwise eligible for parole, was denied consideration.

It bears repeating, however, that the fact that state law requires consideration of a person for parole does not, standing alone, require the use of any particular procedures on that consideration. Unless the right to be considered entails a legitimate claim of entitlement to a particular outcome contingent on particular facts, there is no liberty or property interest. (In *Meachum* v. *Fano, supra*, for example, state regulations gave every inmate transferred from one prison to another a right to a rudimentary hearing. The Court held, however, that the Constitution did not require any particular procedures to be used during the hearing, because the ultimate decision to transfer depended entirely on the discretion of prison officials.)

If our constitutional analysis is correct, Nebraska may avoid any constitutional procedural requirements by amending its statutes to eliminate the presumption in favor of release. Respondents may argue that the state should not be allowed this option. They may contend, as the prisoners in recent parole cases have contended, that parole has become an accepted feature of our prisons, and that prisoners acquire a legitimate expectation of release because most prisoners are released sometime before the ends of their terms. Because eventual parole is the rule rather than the exception, the argument would run, the prisoner's expectation has real substance. But the same argument was rejected in *Roth*; there, too, most teachers were rehired. It was rejected again in *Meachum*; few prisoners were sent to more secure prisons unless they misbehaved in some way, but the Court held that this did not give any prisoner a legitimate claim to avoid his own transfer. The problem with the argument based on the observation that parole (or retention on the job) is common

II

THE DUE PROCESS CLAUSE REQUIRES NEBRASKA PAROLE OFFICIALS TO GIVE PRISONERS A FAIR OPPORTUNITY TO BE CONSIDERED FOR PAROLE

If, as we have argued above, the Due Process Clause applies to parole release proceedings in Nebraska, then the Court must decide what process is due. It need not, however, essay a definite resolution to that question. Nebraska already employs certain procedures, including (in many cases) personal hearings that are tape-recorded, and it gives statements of reasons when it denies release (see page 7, *supra*). There is no need for the Court to consider whether the Constitution requires the State to follow these procedures. On the other hand, the district court rejected several of respondents' original contentions and held, for example, that the Constitution does not require the attendance of counsel and cross-examination of witnesses at the hearings (Pet. App. 38 n.8). Because respondents did not appeal from this adverse determination, these questions are

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is that it does not explain how the fact that *most* teachers are rehired, that *most* prisoners stay where they are, and that *most* prisoners eventually are paroled can be converted into a legitimate claim of entitlement for *this* teacher to be rehired or for *this* prisoner to be paroled. That conversion could be accomplished only through a set of rules of general applicability establishing substantive release criteria binding on the decision maker. The United States does not have such a set of criteria; Nebraska does, but could change or abolish them.

no longer in the case. Petitioners apparently seek review of only two aspects of the court of appeals' procedural holding: that contend that the parole authorities need not grant a personal hearing at the first possible opportunity in every case and that the statement of reasons for denial need not summarize the facts on which the Board relied (Pet. 10-12).

If, as respondents may contend, parole officials should use, in giving initial consideration to parole release, the same procedures established by *Morrissey* v. *Brewer*, *supra*, for parole revocation, then the judgment of the court of appeals should be affirmed in all respects. We believe, however, that the *Morrissey* procedures should not be applied to parole release. Three things set the revocation of parole apart from applications for the grant of parole, and they call for different procedures.

First, those who seek release on parole are prisoners. The hearings are held within prison walls. Consequently, all of the considerations identified by the Court in *Wolff* v. *McDonnell*, *supra*, and *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), are in play here. The calling of witnesses, the use of counsel, the confrontation of persons giving adverse evidence, all may undermine the relationship between prisoner and jailer that is essential to successful management of what may be a tense and hostile environment. Sometimes hearings may set the stage for violence. The Court held in *Wolff* and *Baxter* that, in light of these and other considerations, prison disciplinary hearings need not involve counsel, confrontation, or live wit-

nesses, even though the hearings might lead to decisions that would affect the length of confinement. The same principles apply here.

Second, parole is revoked only because of identifiable misconduct. A revocation hearing involves "charges," and the parolee must have an opportunity to meet those charges. Applications for release on parole, to the contrary, do not involve charges of misconduct. There is no clearly defined question that is to be proved or disproved. The vague criteria in the Nebraska statute (see pages 7-8, *supra*), may call for simply a discretionary assessment of non-verifiable beliefs. A denial of parole cannot be "erroneous" in the same sense that the revocation of parole could be. Because the release decision does not turn on particular facts, it is not well suited to trial-type procedures. The paroling decision comes much closer to the judicial decision concerning the length of sentence to be imposed in the first instance. The sentencing decision traditionally has been made after informal inquiries rather than a trial-type hearing. See generally *United States* v. *Grayson*, No. 76-1572 (June 26, 1978); *Gardner* v. *Florida*, 430 U.S. 349 (1977). It is difficult to see why the Constitution would require for parole decisions procedures more elaborate than it requires for sentencing decisions.

Third, because the procedural requirements of the Due Process Clause depend on a careful balancing of the relevant interests (see *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976)), it is significant that a prisoner who applies for parole is seeking liberty,

rather than trying to avert its loss. A parolee whose freedom is withdrawn is bound to feel the loss much more acutely than will a prisoner who simply is turned down in his request to be released. As the Court put it in *Morrissey*, *supra*, 408 U.S. at 482 n.8, "'[i]t is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom.'"

We therefore submit that *Morrissey* is not an apt model of the procedures to be used in considering applications for parole. The court of appeals also reached this conclusion; it selected *Wolff* as a model, apparently because *Wolff* involved a decision (the revocation of accumulated good-time credits) that would affect the length of imprisonment. The court of appeals apparently concluded that the paroling decision is no less important and should be accompanied by procedures equally likely to avert unwise or uninformed decisions.

There is much to be said for that view. As we have discussed above, the federal Parole Commission uses procedures that in many respects are more elaborate than those spelled out in *Wolff*. But we submit that the second consideration that distinguishes this case from *Morrissey* (see page 40, *supra*) also distinguishes it from *Wolff*. An application for release on parole does not involve charges of misconduct. The questions that influence the release decision are not susceptible of objective proof in most instances. For

example, the question whether a prisoner's "release would depreciate the seriousness of his crime or promote disrespect for [the] law" (Neb. Rev. Stat. § 83-1,114(1)(b) (1976)) cannot be proved by evidence. It is a question similar to that asked by a judge at sentencing, and it should be resolved by the same procedures that are used at sentencing.[20] We therefore agree with petitioners that the court of appeals erred in identifying the nature of the requirements that the Due Process Clause requires to be followed in considering applications for parole in Nebraska.

The court's requirement of an oral hearing, in every case, on the first occasion of parole eligibility will require at least some hearings that serve no significant purpose. Parole authorities usually can identify at least some cases in which hearings would be pointless; cases in which prisoners have committed additional crimes while in prison, or in which they have received unusually short sentences for serious crimes, would be among those in which release at the earliest possible opportunity is so unlikely that a hearing could be nothing but an empty formality.[21]

[20] Cf. *Board of Curators* v. *Horowitz*, 435 U.S. 78 (1978) (although the Due Process Clause applies to the academic dismissal of a medical student, it does not require the use of any particular procedures in light of the subjective nature of the inquiry that is made by the faculty).

[21] The question whether a prisoner had committed a crime or disciplinary infraction in prison may already have been the subject of a criminal trial or a *Wolff* hearing. Parole authorities would not be required to hear the evidence anew. *Morrissey*, *supra*, 408 U.S. at 490 ("[o]bviously a parolee cannot relitigate issues determined against him in other forums").

The Due Process Clause does not require the state to conduct a charade in these cases, and it therefore should be accorded the opportunity to follow some more flexible procedure.[22]

Nebraska reviews the file of each prisoner yearly to determine the likelihood of parole release. Whenever there is a significant chance of release, the State holds a formal hearing at which the inmate is entitled to be present and present evidence. The prisoner apparently can contribute written materials to the file review. This system, if fairly administered, is a constitutionally permissible screening device that holds to a minimum the number of unnecessary oral hearings. A prisoner who has been identified, on the

[22] The federal courts that have found a constitutionally protected interest in the parole release process generally have held that informal procedures are sufficient to satisfy the requirements of the Due Process Clause. See, *e.g.*, *Franklin* v. *Shields*, *supra*, 569 F. 2d at 801 ("the only explicit constitutional requisite is that the Board furnish to the prisoner a statement of its reasons for denial of parole"); *Garcia* v. *Board of Parole*, 557 F.2d 100 (7th Cir. 1977) (general statement of reasons relying on the severity of the offense is an adequate explanation for denial of parole); *Williams* v. *Ward*, 556 F.2d 1143 (2d Cir.), pet. for cert. dismissed, 434 U.S. 944 (1977) (no general need for parole authorities to disclose evidence); *Hill* v. *Attorney General of the United States*, *supra* (general explanation of the Parole Commission's salient factor scores and guideline system is sufficient); *Ganz* v. *Bensinger*, 480 F.2d 88 (7th Cir. 1973) (no need to provide a lawyer at public expense). But see *Drayton* v. *McCall*, *supra* (recission of a parole date before release requires all procedures identified in *Wolff* plus pre-hearing disclosure of evidence, a right to call witnesses, cross-examination of all witnesses, and a right to counsel).

basis of a file review, as an unlikely candidate for parole does not lose much, if anything, by being denied an oral hearing. There seems to be little chance of an "erroneous" deprivation; the circumstances that call for postponing an oral hearing (*e.g.*, the commission of serious offenses while in prison or the receipt of an unusually low sentence, so that parole eligibility comes too soon for serious consideration to be given to release) are objective and capable of accurate resolution in written proceedings.[23] Cf. *Richardson* v. *Perales*, 402 U.S. 389, 407 (1971); *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 344. It may be that a very few persons, although identified by written proceedings as unlikely to be paroled, nevertheless could use an oral hearing to persuade parole authorities to grant early release, but this possibility does not require that an oral hearing be held in every case.[24] "[P]rocedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, not the rare exceptions." *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 344.

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[23] Indeed, as the Court observed in *Moody* v. *Daggett*, *supra*, 429 U.S. at 89, a prisoner may have much to gain by deferring his consideration for parole. Forcing parole authorities to hold hearings at the earliest possible date—as the court of appeals has done—could "deprive the parole authority of vital information" and lead to a decision that "would often be foreordained" (*ibid.*).

[24] If a prisoner should contend that evidence would be lost during a delay, he could make the argument initially in writing, and a hearing then might become appropriate. See *Moody* v. *Daggett*, *supra*, 429 U.S. at 88 n.9.

We also believe that the court of appeals has required too much in the statement of reasons for denying parole. We have no quarrel with the proposition (Pet. App. 21) that a full statement of reasons and a summary of the evidence relied on may relieve "frustration" on the part of some inmates, but that relief is not a necessary part of due process. Judges need not state reasons when imposing sentence,[25] and although the lack of a summary of evidence to accompany a statement of reasons may be frustrating, it is not unconstitutional.

We acknowledge that a requirement of a statement of reasons has become an accepted part of due process safeguards. See, *e.g.*, *Wolff* v. *McDonnell*, *supra*, 418 U.S. at 564-565. But the court of appeals' expansion of that requirement into a constitutional compulsion of a summary of the evidence in a case like this one is unsupported. Because many of the criteria that lead to a denial of parole are subjective assessments of the prisoner's personality and of the crime he committed, there may be little or no "evidence" in the traditional sense. Or it may be that parole authorities follow guidelines indicating an expected range of time to be served for particular offense and offender combinations; in that event the only "evidence" that would explain a decision to deny parole before the guideline range would be that nothing in the prisoner's case

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[25] See, *e.g.*, *Dorszynski* v. *United States*, 418 U.S. 424 (1974).

was out of the ordinary.[26] In still other cases the parole authorities may rely on evidence from confidential sources; so long as this reliance is permissible, the Constitution does not require the evidence to be summarized. It is enough that the evidence can be found in the record. Cf. *Arizona* v. *Washington*, 434 U.S. 497, 516-517 (1978) (state trial judge need not summarize the considerations that led him to declare a mistrial, so long as the record as a whole discloses the basis for the decision).

Perhaps the court of appeals' requirement of a summary of the evidence means no more than that parole authorities must indicate the sort of considerations that influenced their decision; we would not object to such a reading of the Due Process Clause. But if the requirement means more than that, it exceeds the requirements of the Constitution.[27]

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[26] See *Garcia* v. *Board of Parole, supra; Hill* v. *Attorney General, supra.*

[27] The court of appeals gave three reasons—in addition to its reference to "frustration," which is discussed in the text—for its requirement of a statement of reasons and a summary of the evidence. It asserted that this requirement would assist in judicial review, compel members of the board to think about each case, and allow the development of a body of precedent. Pet. App. 21-22. None of these reasons withstands scrutiny.

The court of appeals' statement that reasons and a summary of evidence will assist "judicial review in those situations where it is allowed" may amount to an assertion that such review is "allowed" in the federal courts. That would be incorrect. Cf. *Bishop* v. *Wood*, 426 U.S. 341, 349-350 (1976) (no judicial review of state decisions for mere error). If the court was referring, instead, to review in the state courts, then there is no reason for the imposition of the requirement. State courts are competent to determine what is necessary for their own review; the Constitution does not compel state courts to have records more complete than those courts believe is necessary. The court's second reason—that a statement of reasons will compel board members to think—is based on the unsupported proposition that they now do not think. At all events, this reason would pertain only to a requirement of a statement of reasons; it would not compel a summary of the evidence. The court's final reason—that reasons contribute to the establishment of a body of precedent—rests on the unarticulated premise that the Constitution requires the establishment of a body of precedent. We know of no support for such a premise; certainly federal judges routinely announce sentences without resort to a body of precedent on that subject. Once more, however, even on its own terms the court of appeals' analysis supports only a requirement of a statement of reasons, not a requirement of a summary of the evidence.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings consistent with the opinion of this Court.

Respectfully submitted.

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